IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O. O. C. J.

SUIT NO.1564 OF 1980

The Board of Trustees of the Port of Bombay. ...Plaintiff.

Versus

Messrs Rainbow Products & Anr. ...Defendants

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Mr. U.J. Makhija i/b. Mulla & Mulla for the Plaintiff.

Mr. S. R. A. Shaikh i/b. Thakordas Madgaonkar for the Defendants.

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CORAM : DR. D.Y. CHANDRACHUD, J.

December 15, 2006.

ORAL JUDGMENT:

The Board of Trustees of the Port of Mumbai has instituted the suit which forms the subject matter of these proceedings for the recovery of Port Trust charges prior to the date on which an order of confiscation came to be passed by the Customs Authorities.

2. In July 1976, the Defendants imported a consignment of 320 bags said to contain Moulding Powder which was manifested at Item 300 of the Import General Manifest No.797, dated 22nd July 1976 of a vessel s.s. “Corinthic”. The General Landing date and the last

free day of the cargo of the vessel were 22nd July 1976 and 26th July 1976 respectively. Out of the 320 bags, 304 bags were landed by the ship onto the docks at Mumbai. The consignment was shown as lying at 14 Victoria Docks Warehouse. The Defendants who were importers and/or owners of the consignment failed to clear the cargo. The Customs authorities in the course of import trade control formalities detained the cargo. An order of confiscation was passed on 8th September 1977 by the Deputy Collector of Customs under Section 111(d) of the Customs Act, 1962 read with Section 3 of the Imports and Exports (Control) Act, 1947. The order of confiscation was served on the Plaintiff on 12th September 1977. On 23rd January 1979, the Plaintiff called upon the Defendants to pay a sum of Rs.56,495.76, being the Port Trust Charges that had accrued from the last free day upto the date on which an order of confiscation was passed by the Customs authorities. This was followed by letters dated 23rd January 1979 and 11th December 1979. The charges not having been paid, the present suit came to be instituted for the recovery of a sum of Rs.56,495.76 with interest at the rate of 12% per annum from the date of the suit until payment or realisation and

for the costs of the suit. The claim of the Plaintiff is for wharfage and/or demurrage computed from the last free day until the date immediately prior to the order of confiscation.

3. The suit has been contested by the Defendants who have filed their Written Statement.

4. The following issues were framed in the suit by an order dated 10th December 2001:

> "1. Whether the suit is barred by the law of Limitation as alleged in paragraph 12 of the Written Statement?
>
> 2. Whether Union of India are necessary parties to the suit as alleged in paragraph 4 of the Written Statement?
>
> 3. If the answer to issue No.2 is in the affirmative, if the suit is not maintainable for nonjoinder of Union of India and therefore liable to be dismissed as alleged in paragraph 4 of the Written Statement?
>
> 4. Whether the Plaintiff is entitled to recover a sum of Rs.1,79,854.50 paise or any other sum as Port Trust charges?
>
> 5. To what relief, if any, are the Plaintiffs entitled?
>
> 6. Whether the Defendants prove that a legal obligation is cast upon the Plaintiffs to auction the consignment on Defendants failure to clear the

consignment as stated by him in para 2(a) of Written Statement and effect thereof?

7. Whether the Defendants prove that they have obtained amount from Union of India before making a demand on the Defendants for wharfage charges as stated by Defendants in para 3(b) of Written Statement?

8. What order?"

5. On behalf of the Plaintiff, an affidavit in lieu of the Examination-in-Chief came to be filed of Shri Sanjeev Kumar, Assistant Docks Manager. The witness was cross-examined. No evidence has been adduced on the part of the Defendants.

6. The witness for the Plaintiff explained the basis on which the charges of the Port Trust have been assessed. A copy of the working sheet was annexed to the Plaintiff's letter dated 11th December 1979. The defence to the claim in the suit is that the suit is barred by limitation. The defence in the Written Statement is that the cause of action arose on 27th July 1976, namely, after the expiry of the last free day when the obligation to pay demurrage and wharfage arose. The goods should have been sold in realisation of Port trust

charges. Hence, it is urged that the the suit which was instituted on 2nd August 1980 is beyond the period of three years prescribed by Article 113 of the Schedule to the Limitation Act, 1963. At this stage it would be necessary to record that no defence has been urged on the merits of the claim. The only issue, therefore, which falls for consideration is as to whether the suit was instituted within the period of limitation. The issue of limitation, namely, the first issue can be taken up for consideration.

Issue No.1 :

7. Article 113 of the Schedule to the Limitation Act, 1963 provides a period of limitation of three years in respect of any suit for which no period of limitation is prescribed in the Schedule. Time begins to run when the right to sue accrues. The short question that arises before the Court is when the right to sue can be regarded as having accrued. The defence that has been urged on behalf of the Defendants in these proceedings is that under the provisions of Section 61 of the Major Port Trusts Act, 1963, the Board is at liberty upon the expiry of two months from the time when any goods have

passed into its custody to sell by public auction or by private agreement or tender such goods or such part thereof as may be necessary if any rates payable to the Board in respect of the goods have not been paid, or if any rent payable to the Board in respect of any place on or in which such goods have been stored has not been paid. Similarly, under Section 62, which begins with a non-obstante provision, where any goods placed in the custody of the Board upon the landing thereof are not removed by the owner or other person entitled thereto from the premises of the Board within one month from the date on which such goods were placed in their custody, the Board may, after notice published as provided therein sell the goods by public auction or, as the case may be, by tender or private agreement. The submission, therefore, has been that upon the default of the Defendants to clear the goods immediately after the expiry of the last free day, the Port Trust was duly empowered in law to sell the goods and the right to sue for demurrage must be regarded as having accrued thereupon.

8. On the other hand, on behalf of the Port Trust reliance has

been placed on judgments of this Court and of the Supreme Court which explain the powers of the Port Trust with reference to goods which are placed in its custody. The Plaintiff has submitted before the Court that the goods were under detention for import trade control formalities and it was only after the order of confiscation was passed by the Customs Authorities that the demurrage came to be crystallized. Hence, the right to sue must be regarded as having accrued on the order of confiscation. Counsel submitted that acceptance of the submission of the Defendant would lead to the absurd consequence where the Plaintiff would be compelled to institute a suit for failure to pay every day's demurrage, a consequence which is not envisaged in law.

9. Section 42 of the Major Port Trusts Act, 1963, empowers the Board of Trustees to undertake certain services. Among them are landing, shipping or transshipping of passengers and goods between vessels in the port and the wharves, piers, quays or docks belonging to or in the possession of the Board. The Board is empowered to receive, remove, shift, transport, store and deliver goods which are

brought within the Board's premises (Section 42(1)(b). Under Clause (ii) of Sub-section (1) of Section 43, the responsibility of the Board for loss, destruction or deterioration of goods of which it has taken charge is that of a bailee under Sections 151, 152 and 161 of the Indian Contract Act, 1872. Section 48 lays down the procedure for determining the scale of rates and the conditions under which the services that are to be provided under Section 42 shall be performed by the Board or a person authorised by it. Section 58 provides for the time for payment of rates on goods and enunciates that the rates in respect of goods to be landed shall be payable immediately on the landing of the goods and rates in respect of goods to be removed from the premises of a Board shall be payable before the goods are so removed, shipped or transshipped. Under Sub-section (1) of Section 59 the Board has a lien on goods which are placed in its custody, for the amount of all rates leviable under the Act in respect of any goods and for the rent due to the Board. The Board is empowered to seize and detain the goods until such rates and rents are fully paid. Under Sections 61 and 62 to which reference has already been made in the earlier part of this judgment, the Board is

empowered to sell the goods if rates or, as the case may be, rent is not paid within the period that is stipulated.

10. Under Section 131 the Board is empowered, without prejudice to any other action that may be taken under the Act, to file a suit for the recovery of any rates, damages, expenses, costs or in the case of sale the balance thereof, when the proceeds of sale are insufficient, or any penalties payable to, or recoverable by, the Board under the Act or under any regulations made in pursuance thereof.

11. Under Section 45 of the Customs Act, 1962 all imported goods unloaded in a customs area are to remain in the custody of such person as may be approved by the Collector of Customs until they are cleared for home consumption. The person having custody of the imported goods in a customs area, is under Sub-section (2) of Section 45, under a mandate not to permit such goods to be removed from the customs area or to be otherwise dealt with, except under and in accordance with the permission in writing of the proper officer. In **International Airports Authority of India vs. Grand Slam**

International,[1] the Supreme Court held that an importer must land the imported goods at a seaport or airport and can clear them only after completion of Customs formalities. For the occupation by the imported goods of space in the seaport or airport, the Board or the Authority which is its proprietor is entitled to charge the importer. The fact that until customs clearance, the Board or the Authority may not permit an importer to remove his goods does not imply that charges cannot be levied on the importer for the space that the goods have occupied until their clearance. The Supreme Court held that while it is true that by reason of an unjustified detention of goods by the Customs Authorities the importer is put to loss by having to pay demurrage charges for the period of detention, the Central Government is empowered inter alia by Section 111 of the Major Port Trusts Act, 1963 to issue directions to the Board of Trustees on questions of policy.

12. In the exercise of the power conferred by Section 48 of the Act, a scale of rates is prescribed for services which the Board performs under Section 42. Section 53 empowers the Board in

1 (1995) 3 SCC 151

special cases and for reasons to be recorded in writing, to exempt either wholly or partially, any goods or vessels or class of goods or vessels from the payment of any rate or of any charge leviable in respect thereof according to any scale in force under the Act or remit the whole or any portion of such rate or charge so levied. Exemption or, as the case may be, remission is governed by the policy which has been framed by the Board.

13. The liability to pay demurrage or, as the case may be, wharfage continues to subsist notwithstanding the circumstance that the goods may be subject to Import Trade Control formalities or are detained at the instance of the Customs Authorities. The Board as the bailee is entitled to levy and demand charges for the use of its premises. Until clearance is granted by the Customs Department, an importer is not entitled to clear the goods nor, for that matter, is the Board entitled in law to deliver custody of the goods without the consent of the Customs Authorities. It is to obviate the hardship that is occasioned as a result of the pendency of Import Control proceedings that the Board has while framing the scale of rates

provided for a remission in demurrage in exercise of powers conferred by Section 53 of the Act. The Supreme Court took note of this position in **The Board of Trustees of the Port of Bombay vs. Indian Goods Supplying Co**,[2] where the Court held as follows :

> "The contention put forward on behalf of the respondents is that they are in no way responsible for the delay in clearing the goods as the goods had been detained under the Import Trade Control Regulations. It is no doubt true that before clearance is given by the Import trade Control authorities and the Customs Department the goods cannot be cleared by the respondents. Neither can the Port Trust deliver the goods without the consent of the Import trade Control authorities. Taking into account the hardship caused to the Importer because of the delay certain concessions in demurrage rates are permitted. The Port Trust has prescribed the reduced demurrage levy ....."

14. Under Article 113 of the Limitation Act, 1963, the period of limitation commences at the point of time when the right to sue accrues. In **Mt. Bolo vs. Mt. Koklan**,[3] the Privy Council while construing the expression "right to sue" in the context of Article 120, the residuary article under the earlier legislation on the subject, formulated the principle of law as follows :

> "There can be no "right to sue" until there is an accrual of

2 AIR 1977 SC 1622
3 AIR 1930 Privy Council 270

> the right asserted in the suit and its infringement or at least clear and unequivocal threat to infringe that right by the defendant against whom the suit is instituted."

This principle was reiterated in a judgment of the Supreme Court in **Rukhmabai Vs. Lala Laxminarayan**,[4] where the Court held thus:

> "The right to sue under Art. 120 of the Limitation Act accrues when the defendant has clearly and unequivocally threatened to infringe the right asserted by the plaintiff in the suit. Every threat by a party to such a right, however ineffective and innocuous it may be, cannot be considered to be a clear and unequivocal threat so as to compel him to file a suit. Whether a particular threat gives rise to a compulsory cause of action depends upon the question whether that threat effectively invades or jeopardizes the said right."

In **Gannon Dunkerley and Co. vs. Union of India**,[5] a Bench of two Learned Judges of the Supreme Court followed the same principle and observed thus:

> "... there is no right to sue until there is an accrual of the right asserted in the suit, and its infringement, or at least a clear and unequivocal threat to infringe that right by the defendant against whom the suit is instituted; ..."

4 AIR 1960 SC 335
5 AIR 1970 SC 1433

In a suit arising out of a contract of bailment, the Supreme Court held that the High Court was justified in taking the view that the suit was governed by Article 120 of the Limitation Act and that the suit was not barred under that article. In **State of Punjab vs. Gurdev Singh**,[6] the Supreme Court held that the right to sue ordinarily means the right to seek relief by means of legal proceedings and the right to sue would accrue when the cause of action had arisen:

> "The Court's function on the presentation of plaint is simply to examine whether, on the assumed facts, the plaintiff is within time. The Court has to find out when the "right to sue" accrued to the plaintiff. If a suit is not covered by any of the specific articles prescribing any period of limitation, it must fall within the residuary article. The purpose of the residuary article is to provide for cases which could not be covered by any other provision in the Limitation Act. The residuary article is applicable to every variety of suits not otherwise provided for. Article 113 (corresponding to Article 120 of the Act 1908) is a residuary article for cases not covered by any other provisions in the Act. It prescribes a period of three years when the right to sue accrues. Under Article 120 it was six years which has been reduced to three years under Article 113. According to the third column in Article 113, time commences to run when the right to sue accrues. The words "right to sue" ordinarily mean the right to seek relief by means of legal proceedings. Generally, the right to sue accrues only when the cause of action arises, that is, the right to prosecute to obtain relief by legal means. The suit must be instituted when the right asserted in the suit is infringed or when there is a clear and unequivocal threat to infringe that right by the defendant

6 AIR 1992 SC 111

> against whom the suit is instituted (see: (i) Mt. Bole v. Mt. Koklam and Ors. AIR 1930 PC 270 and (ii) Gannon Dunkerly and co. v. the Union of India MANU/SC/0475/1969."

15. The question as to when the right to sue can be regarded as having accrued came up for consideration before a Division Bench of this Court in the context of a suit for the recovery of a deficit sustained by the Board upon the sale of goods in **The Trustees of the Port of Bombay vs. M/s.Jayantilal L. Gandhi**.[7] The Division Bench held, construing Section 67A of the Bombay Port Trusts Act, 1879 and Article 113 of the Limitation Act, 1963, that the deficit or the balance of the amount that is claimable could only be ascertained after an auction sale was held. Consequently, the Court rejected the submission that the amount which was claimed in respect of demurrage and wharfage charges should be regarded as one for which the cause of action accrues from day-to-day. The Division Bench held as follows :

> "This is a suit to recover the balance of the wharfage and demurrage charges, after giving credit for the sale proceeds. Such amount of deficit could only be ascertained when the auction sale took place on February 6, 1964, and

7 AIR 1979 Bombay 12

> since the appellants have adopted the remedy permitted to them under Section 67-A of the Act, the cause of action for such a suit arose when such deficit was determined upon an auction sale having effectively taken place. Thus, under Section 67-A of the Act the cause of action to recover the balance of the amount, after giving credit for the sale proceeds, accrues, for the first time, when the sale took place, and the deficit of the balance of the amount recoverable is ascertained. Thus, clearly under Section 67-A of the Act to recover the amount, the cause of action accrues when such deficit or balance of the amount to be recovered is ascertained. That event took place in the present case on February 6, 1964."

The right to sue, the Division Bench held, accrues on the date of the auction sale since it was upon the conclusion of the auction that the deficit was ascertained. A Learned Single Judge of the Madras High Court has in **Ananthakrishnan and Company vs. The Board of Trustees of the Port of Madras**,[8] held that the cause of action in an action for recovering Port Trust Charges arises only on the ascertainment of the sale proceeds because it is only then that it can be known with certainty that there is any balance to recover for the service rendered.

16. Where the goods as in the present case are the subject

8 1980(I) Madras L.J.

matter of Import Trade Control formalities, the extent of the liability of the importer to pay demurrage and wharfage charges is crystalised and ascertained upon the order that is passed by the Customs Authorities. If the goods are cleared by the Customs Authorities at the conclusion of ITC formalities, the Customs Authorities would issue a detention certificate and the importer would be entitled to a remission in demurrage in a manner consistent with and to the extent envisaged in the policy of the Board. On the other hand, where as in the present case, the goods are held to be liable to confiscation under Section 111 of the Customs Act, 1962, there is no question of any remission being granted from the payment of demurrage and the property in the goods passes to the Customs Authorities to be dealt with in accordance with law. Upon the passing of an order of confiscation, the Board is not entitled in law to grant clearance of the goods to the importer or to any one, save and except the Customs Department. In these circumstances, once the goods which have been imported and placed into the custody of the Board form the subject matter of detention for Import Trade Control formalities, the right to sue must be regarded as having accrued upon the order of

adjudication that is passed by the Customs Authorities. Where the goods are confiscated, it is upon the order of confiscation that the exact liability of the importer for the payment of pre confiscation charges is ascertained and crystalised.

17. In the present case, there is no dispute about the fact that the suit was instituted within a period of three years from the date of order of confiscation. In a judgment of this Court dated 8th August 2002 in **Board of Trustees of the Port of Bombay vs. Ramanlal Mohanlal Parikh**, (Writ Petition 6321 of 1987), Mr.Justice A.M. Khanwilkar held that the period of limitation shall have to be computed from the date on which the order of confiscation was communicated to the Board. In the present case, however, there is no dispute about the fact that the suit was filed even within the period of three years from the date of order of confiscation. The view expressed by the Learned Single Judge was thus:

> "What is relevant to note is that the Legislature has employed expression "removed from the premises of a Board". The expression "removed" would clothe the situation where the Port Trust becomes incapable of exercising control over those goods. That could happen because the goods are physically removed from its

> premises or even on account of confiscation by the Customs Department. The consequence of confiscation in law, is that the Port Trust is disrobed of its right to exercise control over those goods. To put it differently, an act of confiscation is akin to one of "asporation", which is dejure removal of the goods from the Port Trust who had lien over those goods and of vesting of ownership thereof in the Customs Authority, though the goods may not have been physically removed from the premises of the Port Trust as such. In other words, on the issuance of confiscation order by the Customs Authority, the ownership of such goods, in law, vest forthwith in the Customs Authority and, from that date the Port Trust is denuded of its authority to charge demurrage charges thereon or to deal with those goods in any manner. This is one inevitable consequence of the confiscation order. Indubitably, on and from the date of confiscation by the Customs Authority, the Port Trust becomes disentitled to recover further damages in spite of non clearance of the goods from the Port Trust. A priori, in law, as soon as the confiscation order is passed by the Customs Authority the goods are removed from the control of the Port Trust. In such a situation the rigour of Section 58 would come into play – on account of which the right to recover amount towards the payment of rates of such goods would immediately get crystallized so as to give cause of action for the Port Trust to recover that amount."

The same view was expressed in another judgment of a Learned Single Judge of this Court, Hon'ble Mr.Justice S.N. Variava (as his Lordship then was) in **The Board of Trustees of the Port of Bombay vs. Caravan Hosiery Factory**, Suit No.194 of 1976 decided on 21st July 1988. The Learned Single Judge held thus :

> "In my view, in cases where goods are under a detention order the actual amount can only be ascertained after the adjudication proceedings by the Customs Authorities is completed.
>
> Thus in the present case the cause of action must be deemed to accrue when the adjudication by the Customs Authorities is completed. This is so because had the Customs Authorities adjudicated in favour of the Defendants and released the goods, the Customs Authorities would have been bound to issue a detention certificate for the period during which the goods were under detention. In such a case the Plaintiffs would have been bound to grant a remission in the demurrage charges. The evidence of the Plaintiffs' witness in this behalf has not been questioned by the Defendants. Had the Plaintiffs before the date of the order of adjudication sought to claim the amount of demurrage charges, the Defendants could have refused to pay and have validly taken up the contention that until there is an adjudication the exact amount payable by the Defendants cannot be determined. In my view the exact amount chargeable could only be ascertained on the adjudication proceedings being completed. In this case that could be the order of confiscation passed on 28th August 1973. In this case the suit having been filed within a period of three years from 28th August 1973 it cannot be said that the suit is barred by the law of limitation."

The judgment of the Learned Single Judge was carried in appeal and the appeal came to be dismissed by a Division Bench on 28th July 1992. In appeal, however, the issue of limitation appears not to have been urged.

18. For the aforesaid reasons, therefore, the first issue would have to be answered in the negative.

19. There is no merit in the contention that the Union of India is a necessary party. In fairness, it must be noted that at the hearing, the aforesaid defence has not been pressed or urged. Issues No.2 and 3 are answered in the negative. In so far as Issue No.6 is concerned, Sections 61 and 62 of the Major Port Trusts Act, 1963 are enabling provisions. On the other hand, Section 59 of the Act confers a lien on the Board and empowers the Board to seize and detain the goods until the rates and rents are fully paid. The Board cannot be deprived of its entitlement to pre-confiscation charges. The demurrage and wharfage charges were crystalised only upon the order of adjudication that was passed by the Customs Authorities. Upon the order of confiscation the goods passed out of the ownership of importer.

20. The Plaintiffs have duly proved the claim. The evidence of

the Plaintiff's witness has remained unshaken. The cross-examination of the witness has not elicited any material contradiction in the case of the Plaintiff.

21. The Plaintiff is accordingly entitled to a decree as prayed. The suit shall stand decreed in terms of prayer clause (a). The plaintiff would be entitled to the costs of the suit.

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